Supreme Court, U. S.
FILED
SEP 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-2055

SECURITIES INVESTOR PROTECTION CORPORATION,
Petitioner,

v.

JAMES C. BARBOUR, AS RECEIVER FOR GUARANTY BOND AND SECURITIES CORPORATION AND GUARANTY BOND COMPANY, INC.,
Respondent,

and

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

REPLY BRIEF

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REPLY BRIEF

Introduction

The Receiver's brief in opposition seeks to discourage review by the suggestion that in one way or another SIPC has waived its right to assert the issues raised by the petition. The only issue the Receiver's brief addresses at all on the merits is whether a right of action in favor of customers is implied by the Securities Investor Protection Act of 1970 ("1970 Act"). As to the importance of the issues the Receiver's brief offers the observation that the issues raised by SIPC's petition "did not appear to be of such paramount importance in the courts below."

Importance of Issues as Viewed Below

Whether the courts below considered particular issues to be of greater or lesser importance than others seems clearly irrelevant. In the final analysis that is a judgment which this Court will make irrespective of the opinions of the parties or the inferior courts. To the extent the Receiver would question SIPC's estimate of the importance of these issues in the courts below, it is sufficient reply that the first Point in its brief in the Court of Appeals challenged the implied right of action asserted by the Receiver.

Waiver—Lack of Cross Appeal

That SIPC did not cross appeal from the District Court's order is of no moment whatever. The Court of Appeals was apparently of that view, despite the Receiver's contention (reasserted here) that SIPC's failure to cross appeal deprived it of the right to challenge *in personam* jurisdiction. In any event, it is well-settled that a party may assert on appeal, in the absence of a cross-appeal, any argument supported by the record to sustain the order of judgment below. *Morley Const. Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191 (1937); *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924). For that purpose a party is not limited to the *ratio decidendi* of the District Court.

Waiver—Subject Matter Jurisdiction

Utterly inexplicable is the Receiver's representation (at page 2) that in SIPC's answer ". . . it was not alleged that the Act afforded no private cause of action." SIPC's first affirmative defense alleged: "The petition fails to state a claim against SIPC upon which relief can be granted." The sweep of the Receiver's waiver suggestions is not clear. However, there is no need to pursue them if they are

intended to frustrate review of the questions whether an implied right of action exists and whether the Receiver has standing. Those issues go to the court's jurisdiction over the subject matter, involving ultimately the question of whether a "case or controversy" exists within the meaning of Article III, Section 2 of the United States Constitution. *Nat'l R.R. Passenger Corp.* v. *Nat'l Ass'n of R.R. Passengers,* 414 U.S. 453, 456 (1974); *Allen* v. *State Board of Election,* 393 U.S. 544 (1969); *Flast* v. *Cohen,* 392 U.S. 83, 95 (1968); *J. I. Case* v. *Borak,* 377 U.S. 426, 431, 433 (1964); see WRIGHT, LAW OF FEDERAL COURTS 58 (2d ed. 1970). It is elementary that a defect in subject matter jurisdiction cannot be waived by the parties, may be raised for the first time on an appeal, and that even if not raised by the parties the court must examine its jurisdiction *sua sponte.* F.R.C.P. 12(h)(3); *American Fire & Cas. Co.* v. *Finn,* 341 U.S. 6, 17-18 (1951); *United States* v. *Griffin,* 303 U.S. 226, 229 (1938); *Mansfield, C.&L.M.Ry. Co.* v. *Swan,* 111 U.S. 379 (1884); see WRIGHT, *op. cit. supra* at 51; 1 MOORE FEDERAL PRACTICE ¶ 0.60 [4], p. 609 (14th ed. 1974).[1]

Waiver—Personal Jurisdiction

In advancing waiver to avoid review of the personal jurisdiction issue, the Receiver culls certain remarks of SIPC's counsel from the colloquy before the District Court. An excursion through the transcript and a dispute concerning inferences from counsel's remarks are unnecessary. What should have been an ordinary civil action commenced by the proper service of a summons and complaint was facilely handled by the Receiver as a matter ancillary to

1. As this Court long ago stated in the *Swan* case, III U.S. at 382: ". . . but the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act."

the receivership *via* a petition and order to show cause served by mail. Not only did SIPC's answer affirmatively plead lack of jurisdiction, but it also denied the personal jurisdiction allegations in the Receiver's petition. Obviously SIPC's objection was timely and sufficient under the Federal Rules of Civil Procedure.

The Receiver's procedure raised very serious questions as to the nature of the proceeding and the procedures which would be followed in what was not commenced or readily identifiable as an ordinary civil action. In an effort to expedite resolution of the substantive issues SIPC merely made a conditional *offer* to put aside its defense of lack of personal jurisdiction *provided* it could be agreed that the proceeding would continue as a normal civil action wherein the parties would be bound by the appropriate provisions of the Federal Rules of Civil Procedure. That offer was made in writing[2] and it is that to which the remarks of SIPC's counsel related. There was no response to that offer and the District Court did not attempt to

2. In its memorandum filed with the District Court SIPC stated:

> "It is well settled law that parties cannot confer upon a court jurisdiction over the subject matter if, in fact, jurisdiction is lacking. Although as stated below SIPC is willing to waive its objections to jurisdiction over its person, upon certain reasonable conditions, it is powerless to do so insofar as subject matter jurisdiction is concerned.
>
> SIPC's Qualified Consent To
> Jurisdiction Of Its Person
>
> In the circumstances of this case and *solely* for the purpose of expediting the resolution of the substantive issues presented, assuming *arguendo* this Court has jurisdiction over the subject matter, SIPC will agree to waive its objections to jurisdiction over the person (SIPC), provided and on condition that "Receiver's Petition No. 22" be deemed a complaint in a plenary action, that SIPC's Answer and the Response of the Commission be deemed the responsive pleadings to the petition under Rule 8 of the Federal Rules and that the action proceed as in the normal course of any action commenced in a federal distict court, subject to all of the Federal Rules including but not limited to those pertaining to discovery."

implement it. Rather, the District Court ruled on the merits of SIPC's objections to personal jurisdiction, as did the Court of Appeals. Obviously neither court was of the view that SIPC had waived its rights. The District Court was in the best position to appraise the statements of counsel. The Receiver's claim of waiver lacks support in the record and falls woefully short of the rule that a waiver of legal rights can be found only where there is decisive unequivocal conduct from which it can inferred there was ". . . an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); *Petrowski* v. *Hawkeye Security Ins. Co.*, 350 U.S. 495 (1956); see also *Groves* v. *Prickett*, 420 F.2d 119 (9th Cir. 1970). In the *Petrowski* case this Court held that an objection to personal jurisdiction was waived by a clear written stipulation to that effect. The Receiver's claim of waiver is an insubstantial attempt to convert a commendable unaccepted conditional offer into a damaging unintended unqualified waiver.

Merits of Issues Presented For Review

The Receiver's brief says little concerning the real issues. It is silent on the merits of the personal jurisdiction issue. It is silent on SIPC's contention that the 1970 Act cannot be applied to this completed receivership (Petition at 20-23), but seeks to avoid the important issues raised by the Court of Appeals' rejection of that defense by asserting the Court of Appeals made no determination on this issue.

The Receiver's brief does touch upon the issue of whether the Act implies a private right to bring an enforcement action against SIPC. He fails to refute SIPC's reasons why this question merits review by this Court, and his discussion of the merits leaves unanswered SIPC's analysis and arguments. Essentially, the Receiver attempts to distinguish the *Amtrak* case, makes no comment on the other

authorities cited by SIPC and relies on *Allen* v. *State Board of Election,* 393 U. S. 558 (1969) and *J. I. Case Co.* v. *Borak,* 377 U. S. 428 (1964). Brief comment seems appropriate.

Essentially, the Receiver seems to advance the thesis that if a federal statute is intended to benefit a class of persons, a private right of action to prevent or redress violations of that statute should be inferred. Such a sweeping proposition is unsupported by the cases including those cited by the Receiver. The Receiver's argument is nothing more than a call for judicial legislation. The *Amtrak* case, among others, is solid authority against the Receiver. There this Court adhered to traditional principals of statutory construction and its historic constitutional responsibility to effectuate the laws of Congress. It declined to create a private right of action by a process of judicial interpolation. Emphasizing that the Act was intended for the benefit of "securities investors" the Receiver attempts to distinguish the *Amtrak* case by asserting: "There was a sharp difference of opinion among the litigants and the courts as to whether or not railroad passengers were the intended beneficiaries of the Amtrak Act." (Brief in Opposition, page 6). No justification appears for that comment, and in fact this Court's opinion assumed that passengers were intended beneficiaries.

The *Allen* and *Borak* cases, supra, are most inapposite. Distinctions of substance abound. In *Borak,* a congressional intent to provide a private right of action to enforce the proxy rules under the Securities Exchange Act of 1934 ("Exchange Act") was evident from Section 27 thereof which specifically confers jurisdiction on the federal district courts over "all suits in equity and actions at law to enforce any liability or duty created" under the Exchange Act. In *Allen,* a congressional intent to provide a private right of action to enforce the Voting Rights Act of 1965 was supported by Section 5 thereof. The existence of an implied

private right of action was supported by the Securities and Exchange Commission in *Borak* and by the United States in *Allen,* a factor which this Court found "significant" in *Allen.*[3] In both cases this Court observed that the objectives of the statute in question would be seriously hampered absent a private right, although the force of such a consideration as an aid in statutory construction may be diminished in light of the *Amtrak* decision.

The Receiver's reliance on the *Allen* and *Borak* cases is misplaced not only in light of the foregoing but for all of the reasons given in SIPC's petition. Regardless of the merits, however, the Receiver has not demonstrated that this question lacks the requisite importance to warrant this Court's review.

CONCLUSION

For reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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3. In the instant case the SEC's position is that to infer a private enforcement right parallel to the Commission's is inconsistent with the design of the 1970 Act. The SEC stated that the specific language of Section 7(b) of the 1970 Act, authorizing only the Commission to act against SIPC, and the legislative history, suggest that Congress intended that to be the exclusive procedure for compelling SIPC to act. (Memorandum for the Securities and Exchange Commission at 4)